

# OPEN MEETING ITEM

**COMMISSIONERS**  
GARY PIERCE - Chairman  
BOB STUMP  
SANDRA D. KENNEDY  
PAUL NEWMAN  
BRENDA BURNS



**ORIGINAL**



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Executive Director  
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## ARIZONA CORPORATION COMMISSION

2011 MAR -1 P 2:39

DATE: MARCH 1, 2011

DOCKET NO.: W-01808A-09-0137

AZ CORP COMMISSION  
DOCKET CONTROL

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Sarah N. Harpring. The recommendation has been filed in the form of an Opinion and Order on:

### CHARLES J. DAINS v. RIGBY WATER COMPANY (COMPLAINT)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

MARCH 10, 2011

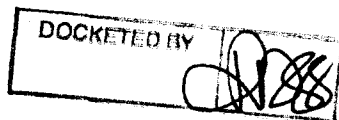
The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

MARCH 16, 2011

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

Arizona Corporation Commission  
**DOCKETED**

MAR 1 2011



  
ERNEST G. JOHNSON  
EXECUTIVE DIRECTOR

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 GARY PIERCE - Chairman  
4 BOB STUMP  
5 SANDRA D. KENNEDY  
6 PAUL NEWMAN  
7 BRENDA BURNS

8 CHARLES J. DAINS,  
9 COMPLAINTANT,  
10 V.  
11 RIGBY WATER COMPANY,  
12 RESPONDENT.

DOCKET NO. W-01808A-09-0137

DECISION NO. \_\_\_\_\_

OPINION AND ORDER

11 DATE OF HEARING: September 20, 2010

12 PLACE OF HEARING: Phoenix, Arizona

13 ADMINISTRATIVE LAW JUDGE: Yvette B. Kinsey<sup>1</sup>

14 APPEARANCES: Mr. Craig A. Marks, CRAIG A. MARKS, PLC, on  
15 behalf of the Complainant;

16 Mr. Stanley B. Lutz and Mr. Steven A. Hirsch, BRYAN  
17 CAVE, LLP, on behalf of the Respondent; and

18 Ms. Robin Mitchell, Staff Attorney, Legal Division, on  
19 behalf of the Utilities Division of the Arizona  
Corporation Commission.

20 **BY THE COMMISSION:**

21 This case involves a Formal Complaint filed with the Arizona Corporation Commission  
22 ("Commission") by Charles J. Dains (as an individual, "Mr. Dains," and as Complainant, "Dains")  
23 against Rigby Water Company ("Rigby") arising out of an arrangement and main extension  
24 agreement ("MXA"), under which Mr. Dains and his son constructed the water system to serve a  
25 residential subdivision in Avondale for a cost of approximately \$237,000, in return for refunds to be  
26 made over a 20-year period. Dains asserts that Rigby actually purchased the water system and that

27 \_\_\_\_\_  
28 <sup>1</sup> Administrative Law Judge Yvette B. Kinsey presided over all of the proceedings in this matter. The Recommended  
Opinion and Order was written by Administrative Law Judge Sarah N. Harpring.

1 Rigby has not made payment for the system as promised and also that Rigby must refund Dains the  
 2 entire amount advanced under the MXA because Rigby failed to file the MXA with the Commission  
 3 for approval.

4 \* \* \* \* \*

5 Having considered the entire record herein and being fully advised in the premises, the  
 6 Commission finds, concludes, and orders that:

### 7 FINDINGS OF FACT

#### 8 The Parties

9 1. Rigby is a public service corporation authorized pursuant to a Certificate of  
 10 Convenience and Necessity ("CC&N") to provide water service in an area of Maricopa County that  
 11 includes the subdivision known as Terra Mobile Ranchettes Estates ("Terra Ranchettes.") (Ex. R-1 at  
 12 4.) Rigby currently provides water utility service to approximately 320 customers. (See Tr. at 130.)

13 2. Since 1993, Rigby has been managed by First National Management ("First  
 14 National"), which acquired Rigby in May 1994. (Tr. at 106, 125.) Fred T. Wilkinson, current  
 15 President of Rigby and First National, has been involved in the management of Rigby since 1993.  
 16 (Tr. at 100, 106.) Mr. Wilkinson has been involved with the operation of private water utilities for  
 17 approximately 50 years and has been certified as a Grade II operator for water treatment and water  
 18 distribution systems and as a Grade II operator for wastewater treatment and collection systems. (Ex.  
 19 R-1 at 2.) Mr. Wilkinson was directly involved in the dealings between Rigby and Mr. Dains. (*Id.* at  
 20 4.)

21 3. Prior to the 1994 acquisition of Rigby by First National, Rigby was operated and  
 22 partially owned by Tom and Clareann Macherione. (Ex. R-1 at 5.)

23 4. In approximately November 1984, Mr. Dains and his son, Charles D. Dains ("CD  
 24 Dains"), formed a partnership along with three other individuals ("TR partnership") for the purpose  
 25 of developing Terra Ranchettes, (*see* LFE D-11),<sup>2</sup> an 83-lot manufactured home subdivision to be  
 26 located in the City of Avondale, (Ex. D-1 at 1; Tr. at 20). Terra Ranchettes was the second  
 27

28 <sup>2</sup> LFE means Late-Filed Exhibit.

1 development for the TR partnership, but the first that involved a private water utility rather than a  
2 municipal water utility. (Tr. at 52.) Mr. Dains was directly involved in the dealings between TR  
3 partnership and Rigby related to Terra Ranchettes, although CD Dains testified that he participated  
4 fully in the business decisions that led to the development of Terra Ranchettes.<sup>3</sup> (See Ex. D-1 at 1.)

5 5. Mr. Dains died during the pendency of this matter, in the fall of 2009. (Ex. D-1 at 6.)  
6 The Complaint is now being pursued by the Estate of Charles J. Dains ("Estate").<sup>4</sup>

7 6. CD Dains is the President of Sundancer Motors, an automobile and truck dealership in  
8 Glendale, Arizona. (Ex. D-1 at 1.)

9 7. Rigby is currently involved in a condemnation proceeding through which the City of  
10 Avondale seeks to acquire Rigby's assets, including the water system that serves Terra Ranchettes.  
11 (See Ex. R-1 at 18; Tr. at 95-96, 163.) Rigby and the City of Avondale have tentatively reached a  
12 settlement agreement in the condemnation proceeding under which Rigby would receive \$2,560,000.  
13 (Tr. at 164.)

#### 14 **Procedural History**

15 8. On March 19, 2009, Dains filed with the Commission a Formal Complaint  
16 ("Complaint") requesting that the Commission order Rigby to pay to Dains the entire amount of the  
17 refundable advance under the MXA, less the refunds made to date. Dains asserted that because the  
18 MXA was never filed with the Commission as required under Arizona Administrative Code  
19 ("A.A.C.") R14-2-406(M) ("Rule 406(M)"), the entire amount of the refundable advance was  
20 immediately due and payable to him. In the Complaint, Dains also asserted that Rigby would be  
21 unjustly enriched if Rigby were either purchased or condemned by the City of Avondale  
22 ("Avondale") and also permitted to retain the unrefunded balance of the advance made by Dains.

23 9. On April 13, 2009, Rigby filed an Answer and Motion to Dismiss.

24 10. On May 5, 2009, Dains filed a Response to Rigby's Answer and Motion to Dismiss  
25 and also filed a Motion for Summary Judgment.

26 <sup>3</sup> CD Dains never had any direct interactions with Rigby regarding the development of Terra Ranchettes or the MXA,  
27 but testified that Mr. Dains discussed the matter with him regularly as Mr. Dains's interactions with Mr. Wilkinson  
occurred. (Tr. at 30-31.)

28 <sup>4</sup> Official notice is taken of the May 6, 2010, Affidavit filed in this docket by Annavate V. Dains, Personal  
Representative of the Estate, authorizing counsel to represent the Estate in this matter.

1        11.     On May 14, 2009, a Procedural Order was issued scheduling a procedural conference  
2 to be held on June 2, 2009.

3        12.     On May 18, 2009, Rigby filed a Reply in Support of Motion to Dismiss and a copy of  
4 the MXA.

5        13.     On June 2, 2009, a procedural conference was held at the Commission's offices in  
6 Phoenix, Arizona, at which Dains, Rigby, and the Commission's Utilities Division ("Staff") appeared  
7 through counsel. At the procedural conference, Staff was requested to file a copy of an October 2006  
8 informal complaint made with the Commission's Consumer Services Section by Dains against Rigby.  
9 The parties were encouraged to engage in settlement discussions and were directed to make a joint  
10 filing the week of June 29, 2009, to provide the status of any settlement discussions.

11       14.     On June 2, 2009, Staff filed a copy of an informal complaint against Rigby made to  
12 the Commission's Consumer Services Section on October 19, 2006. The informal complaint was  
13 filed by "Charlie Dains" and stated that it was "for the family."<sup>5</sup>

14       15.     On June 9, 2009, Rigby filed a Response to Complainant's Motion for Summary  
15 Judgment; a Counterstatement of Undisputed Facts in Response to Complainant's Motion for  
16 Summary Judgment; and the Declaration of Fred T. Wilkinson, President of Rigby, in support of  
17 Rigby's Response to Complainant's Motion for Summary Judgment.

18       16.     On June 29, 2009, Dains and Rigby filed a Joint Filing Regarding Settlement Status,  
19 in which they reported that settlement did not appear likely.

20       17.     On September 15, 2009, a Procedural Order was issued stating that a hearing should  
21 be scheduled to resolve genuine issues of dispute raised in the matter; scheduling a hearing for  
22 October 29, 2009; and establishing other procedural requirements.

23       18.     On October 5, 2009, Dains filed a Motion to Continue Hearing, requesting that the  
24 hearing be continued briefly and requesting that a procedural deadline likewise be extended. Dains  
25 also filed a Motion to Compel, requesting that Rigby be compelled to respond to data requests to  
26 which it had objected.

27  
28 <sup>5</sup> Official notice is taken of this informal complaint form.

1        19.     On October 7, 2009, Rigby filed a Response to Complainant's Motion to Continue,  
2 asserting that the hearing time should not be continued but instead used as an opportunity to hold oral  
3 argument on Rigby's Motion to Dismiss, upon which no ruling had yet been made. Rigby also filed a  
4 Response to Complainant's Motion to Compel, asserting that it should be denied.

5        20.     On October 23, 2009, a Procedural Order was issued stating that Rigby's Motion to  
6 Dismiss should not be granted at that time; vacating the hearing scheduled for October 29, 2009;  
7 requiring the parties jointly to file mutually agreeable dates of availability for hearing; and scheduling  
8 November 5, 2009, oral argument on Dains's Motion to Compel.

9        21.     On November 5, 2009, oral argument on Dains's Motion to Compel was held at the  
10 Commission's Offices in Phoenix, Arizona. Dains, Rigby, and Staff appeared through counsel, and  
11 Dains and Rigby informed the Administrative Law Judge that the discovery dispute had been  
12 resolved through Rigby's providing answers to the data requests at issue. The parties again were  
13 strongly urged to attempt to reach settlement on the Complaint, and the parties proposed a new  
14 hearing date of December 1 or 2, 2009.

15        22.     On November 9, 2009, a Procedural Order was issued rescheduling the hearing in this  
16 matter for December 2, 2009, at the Commission's Offices in Phoenix, Arizona; ruling that  
17 Complainant's Motion to Compel was moot; and ordering the parties to continue working toward  
18 resolution of the issues raised in this matter.

19        23.     On November 24, 2009, Dains filed a Motion to Continue Hearing, explaining that  
20 Mr. Dains had died on November 18, 2009, and that CD Dains, was expected to take over for his  
21 father in pursuing the case, but needed additional time to address family business and prepare for  
22 hearing. Dains requested an indefinite continuance and stated that Rigby and Staff had been advised  
23 of the request and had no objections.

24        24.     On November 25, 2009, a Procedural Order was issued vacating the hearing scheduled  
25 for December 2, 2009, and requiring Dains to file a status report by February 26, 2010.

26        25.     On March 2, 2010, Dains filed Complainant's Status Report, stating that Dains was  
27 ready to proceed and requesting a short telephonic procedural conference for the purpose of setting a  
28 hearing schedule.

1        26.     On March 22, 2010, a telephonic procedural conference was held in this matter, with  
2 Dains, Rigby, and Staff appearing through counsel. Counsel for Dains explained that Mr. Dains's  
3 widow was the executor of the Estate and that the Estate would be the party in the case, although  
4 Mrs. Dains would not be participating herself. Counsel for Dains was instructed to make a filing  
5 regarding his client's standing to pursue the matter and providing mutually agreeable dates for  
6 hearing. The parties were instructed that a Procedural Order would be issued regarding the filing  
7 requirement.

8        27.     On April 19, 2010, a Procedural Order was issued requiring counsel for Dains to file,  
9 by May 7, 2010, documentation establishing that an individual was authorized to pursue the  
10 Complaint on behalf of the Estate, along with an affidavit of the authorized individual stating that the  
11 authorized individual intended to pursue the Complaint on behalf of the Estate.

12        28.     On May 6, 2010, Dains filed the Affidavit of Annavate V. Dains, the widow of Mr.  
13 Dains, along with Letters of Appointment of Personal Representative in the Matter of the Estate of  
14 Charles J. Dains. In the Affidavit, Mrs. Dains stated that she had been appointed the Personal  
15 Representative of the Estate and that she authorized counsel for Dains to represent the Estate in this  
16 matter. The Letters of Appointment of Personal Representative showed that the Maricopa County  
17 Superior Court had appointed Mrs. Dains as the Personal Representative of the Estate on May 5,  
18 2010.

19        29.     On May 21, 2010, Dains filed a proposed procedural schedule for this matter.

20        30.     On July 9, 2010, a Procedural Order was issued scheduling the hearing in this matter  
21 for September 20, 2010, at the Commission's offices in Phoenix, Arizona, and establishing other  
22 procedural requirements and deadlines.

23        31.     On July 30, 2010, Dains filed the Direct Testimony of CD Dains and David C.  
24 Iwanski, Chairman of the Avondale Planning and Zoning Commission.

25        32.     On August 20, 2010, Rigby filed the Direct Testimony of Fred T. Wilkinson and,  
26 separately, a Motion to Strike Testimony of David C. Iwanski ("Motion to Strike").<sup>6</sup>

27        <sup>6</sup> Rigby asserted that Mr. Iwanski has no personal knowledge relevant to this matter, had demonstrated no expertise in  
28 the regulation or operation of a public service corporation that would assist the trier of fact, had provided testimony  
contrary to Arizona law, and had offered legal arguments rather than true expert testimony.

1           33.     On August 20, 2010, Staff filed the Direct Testimony of Bradley Morton, Staff Public  
2 Utilities Consumer Analyst II.

3           34.     On September 3, 2010, Dains filed a Response to Motion to Strike.<sup>7</sup>

4           35.     On September 10, 2010, Rigby filed a Reply in Support of Motion to Strike.

5           36.     On September 20, 2010, a full evidentiary hearing was held before a duly authorized  
6 Administrative Law Judge of the Commission at the Commission's offices in Phoenix, Arizona.  
7 Dains, Rigby, and Staff appeared through counsel and presented testimony and documentary  
8 evidence. As a preliminary matter, before testimony was offered, Rigby's Motion to Strike was  
9 granted in part, striking Mr. Iwanski's pre-filed Direct Testimony, except as to that portion pertaining  
10 to his role as Chairman of the Avondale Planning and Zoning Commission and his personal  
11 knowledge of the actions taken by Avondale regarding the condemnation proceeding against Rigby,  
12 and striking Exhibit DCI-6. (Tr. at 8-9.) Dains presented the testimony of CD Dains and of Mr.  
13 Iwanski. Rigby presented the testimony of Mr. Wilkinson. Staff presented the testimony of Mr.  
14 Morton. No members of the public appeared to provide comment. At the conclusion of the hearing,  
15 Rigby was informed that it would be required to provide additional documentation regarding the  
16 Avondale condemnation process, and Dains was informed that it needed to file a copy of the  
17 partnership agreement for Terra Ranchettes, but that a Procedural Order would be issued requesting  
18 the information and setting a briefing schedule.

19           37.     On October 4, 2010, Dains filed copies of the General Partnership Agreement for  
20 Terra Mobile Ranchettes Estates, an Amendment to the General Partnership Agreement, and a  
21 Corrected Amendment to the General Partnership Agreement. (LFE D-11.)

22           38.     On October 19, 2010, Dains filed a Motion to Admit Late-Filed Exhibits, requesting  
23 the admission of Dains 12, a copy of an August 1985 Certificate of Approval to Construct (Water  
24 Facility Improvements) issued by the Maricopa County Health Department for Terra Ranchettes, and  
25 Dains 13, a copy of a May 1996 Memo issued by the Maricopa County Environmental Services  
26

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27 <sup>7</sup> Dains asserted that the Commission is not bound by the Rules of Evidence, that Mr. Iwanski's testimony is typical of  
28 testimony offered at the Commission, that Mr. Iwanski has significant experience with municipal water utilities and  
knowledge of private water utilities and development issues, and that Mr. Iwanski has personal knowledge concerning  
Avondale's planned acquisition of Rigby.



1 Department stating that the previously issued Certificate of Approval to Construct had been  
2 reinstated.

3 39. On October 28, 2010, Rigby filed a Response to Motion to Admit Late-Filed Exhibits  
4 and Alternative Request to Admit Additional Late-Filed Exhibits, stating that Rigby did not object to  
5 the late admission of Dains 12 and Dains 13, but that two additional documents should also be  
6 admitted as Late-Filed Exhibits: RWC 15, a February 1996 Water Report by James M. Samer  
7 indicating that construction of Terra Ranchettes would require installation of an additional 50,000  
8 gallons of storage capacity, and RWC 16, a March 1985 letter from Rigby to the Arizona Department  
9 of Water Resources ("ADWR").

10 40. On November 4, 2010, Dains filed a Reply to Rigby's Response, stating that Dains did  
11 not object to the admission of RWC 15 and RWC 16 and providing Dains's position regarding how  
12 each of these documents should be interpreted.

13 41. On November 16, 2010, a Procedural Order was issued admitting into evidence Late-  
14 Filed Exhibits Dains 12, Dains 13, Rigby 15, and Rigby 16 and requiring the parties to file closing  
15 briefs by December 15, 2010, and reply briefs by January 14, 2011.

16 42. On December 15, 2010, the parties filed their initial briefs.

17 43. On December 29, 2010, Dains filed a Motion to Consolidate this docket with Docket  
18 No. W-01808A-10-0390, in which Rigby had filed an application requesting approval to transfer its  
19 assets and operations to Avondale and for cancellation of its CC&N ("Cancellation Docket").

20 44. On January 7, 2011, Rigby filed a Response in Opposition to Motion to Consolidate.

21 45. On January 12, 2011, a Procedural Order was issued requiring Staff to file, by January  
22 28, 2011, a response to Dains's Motion to Consolidate.

23 46. On January 14, 2011, Dains, Rigby, and Staff filed their reply briefs.

24 47. Also on January 14, 2011, Dains filed a Reply Concerning Motion to Consolidate.

25 48. On January 28, 2011, Staff filed its Response to Motion to Consolidate, opposing  
26 consolidation.

27 49. On February 2, 2011, in the Cancellation Docket, a Procedural Order was issued  
28 denying Dains's Motion to Consolidate; granting Dains's Motion to Intervene in the Cancellation

1 Docket;<sup>8</sup> scheduling a hearing in the Cancellation Docket for April 14, 2011; and establishing other  
2 procedural requirements and deadlines.

3 **The Dealings Leading Up to the MXA**

4 50. On March 19, 1985, Tom Macherione, then-President of Rigby, sent ADWR a letter  
5 regarding the assured water supply for Terra Ranchettes, in which Mr. Macherione stated that based  
6 upon information provided to date by Mr. Dains and his engineers, Samer and Associates,<sup>9</sup> Rigby  
7 agreed to furnish water to Terra Ranchettes through 84 residential metered service connections from  
8 its existing Well #1 water supply. (LFE R-16.) Mr. Macherione further stated that water service by  
9 Rigby was "expressly conditioned upon the developers [sic] financing the cost of the project,  
10 conveyance of land titles and easements, and obtaining all necessary governmental approvals,"  
11 including but not limited to approvals of ADWR, the Arizona Department of Health Services,  
12 Maricopa County, Avondale, and the Commission. (*Id.*)

13 51. On April 22, 1985, the Maricopa County Health Department ("MCHD") issued a letter  
14 to the TR partnership advising that the proposed Terra Ranchettes subdivision could not be forwarded  
15 to the State Real Estate Department because Rigby was not in compliance with the Safe Drinking  
16 Water Act of Arizona. (Ex. D-1 at CDD-2.) The letter stated that Rigby was out of compliance with  
17 testing requirements for inorganic chemicals and radiochemicals and that the MCHD would be able  
18 to send the "Certificate of Approval of Sanitary Facilities for Subdivisions" to the Arizona Real  
19 Estate Department when the violations were satisfactorily eliminated. (*Id.*)

20 52. On August 16, 1985, ADWR issued Mr. Dains a Certificate of Assured Water Supply  
21 ("CAWS") for Terra Ranchettes,<sup>10</sup> stating that the water for Terra Ranchettes would be provided by  
22 Rigby. (Ex. D-2 at DCI-3.)

23 53. On August 28, 1985, the MCHD issued the TR partnership a Certificate of Approval  
24

25 <sup>8</sup> Dains's Motion to Intervene in the Cancellation Docket had been filed on November 30, 2010.

26 <sup>9</sup> A Water Report done for Terra Ranchettes by Samer and Associates, Inc., of Phoenix, in approximately 1985 or  
27 1986, calculated actual domestic water demand of Terra Ranchettes using a figure of 140 gallons per day per person, with  
28 3 persons per lot, for a total subdivision demand of 34,860 gallons per day. (Ex. R-1 at RWC-8; Tr. at 118.) This would  
reflect annual water usage of 12,723,900 gallons per year for the entire Terra Ranchettes, assuming full occupancy of the  
83 lots. (*See* Ex. R-1 at RWC-8.)

<sup>10</sup> The CAWS referred to the development as "Terra Ranchette Estates Subdivision." (Ex. D-2 at DCI-3.)

1 to Construct ("ATC") for the water distribution system to serve Terra Ranchettes<sup>11</sup> lots 1 through 83.  
2 (LFE D-12.)

3 54. According to CD Dains, Rigby was noncompliant with the Arizona Safe Drinking  
4 Water Act from 1985 until 1995, and this prevented the TR partnership from developing Terra  
5 Ranchettes because it could not obtain water service. (Ex. D-1 at 2-3.) Mr. Wilkinson initially  
6 refuted this, stating that Rigby was in full compliance with all regulatory agencies in the early 1990s,  
7 but later acknowledged that he actually had no firsthand knowledge whether Rigby was in  
8 compliance in 1992 and 1993. (Ex. R-1 at 6; Tr. at 135-36.) Maricopa County issued Rigby a Cease  
9 and Desist Order in April 1994 and again found Rigby to be noncompliant in March 1995.<sup>12</sup> CD  
10 Dains testified that Rigby's noncompliance resulted in three partners dropping out of the TR  
11 partnership and in the TR partnership's being forced to carry a high-interest note and to pay real  
12 estate taxes for more than 10 years before development could move forward. (Ex. D-1 at 3.)

13 55. On October 20, 1995, the TR partnership agreement was amended to include only Mr.  
14 Dains and CD Dains, as equal partners. (LFE D-11.)

15 56. Mr. Wilkinson testified that Mr. Dains first contacted Rigby about Rigby's providing  
16 water service to Terra Ranchettes in or around 1995, (Ex. R-1 at 4), although he acknowledged that  
17 he would not have been aware of any contact between Mr. Dains and Rigby before Mr. Wilkinson  
18 became manager in 1993, (Tr. at 106). Mr. Wilkinson testified that, in response, he sent Mr. Dains a  
19 letter advising him of the need to enter into an MXA before the water infrastructure was constructed  
20 and advising him that Commission regulations govern MXAs. (*Id.*)

21 57. On January 26, 1996, Mr. Wilkinson sent Mr. Dains a letter explaining that First  
22 National was Rigby's agent; that Rigby is a public service corporation under Commission jurisdiction

23 <sup>11</sup> The ATC referred to the development as "Terra Ranchette Estates." (LFE D-12.)

24 <sup>12</sup> The April 1994 Cease and Desist Order ("C&D Order") stated that Rigby was noncompliant with Chapter V of the  
25 Maricopa County Health Code and A.A.C. R18-4-212 because Rigby did not have water storage capacity equal to the  
26 average daily demand during the peak month of the year. (Ex. D-1 at CDD-3.) The C&D Order required Rigby  
27 immediately to cease and desist from operating or maintaining Rigby's water system in noncompliance with the Maricopa  
28 County Health Code and the Rules of the State of Arizona. (*Id.*) In response to the C&D Order, Rigby entered into a  
Compliance Agreement with MCESD stipulating that Rigby would provide adequate storage capacity by May 31, 1996.  
(*Id.*) The Compliance Agreement was approved by the Director of the Maricopa County Environmental Services  
Department on May 27, 1994. (*Id.*) On March 8, 1995, the Maricopa County Department of Environmental Management  
Division of Water and Waste Management inspected Rigby's Rigby System and found it to be noncompliant because,  
among other things, it lacked adequate storage tank capacity. (Ex. D-9.)

1 and required to comply with Commission rules and regulations; that First National was providing Mr.  
2 Dains a copy of Rule 406 regarding MXAs and setting forth the requirements that needed to be  
3 followed for Rigby to provide water service to the proposed Terra Ranchettes; that Rule 406 required  
4 completion of an MXA; that an MXA requires an applicant to cause the water system to be  
5 constructed and the utility to refund the cost of the system to the applicant under certain terms and  
6 conditions; that First National's engineer and field personnel had reviewed the proposed water plans  
7 for Terra Ranchettes and had no comments or corrections but were concerned with the "questionable"  
8 storage requirement; that Rigby had approximately 60,000 gallons of storage capacity; that the TR  
9 partnership's engineer should contact ADEQ to determine what additional storage capacity might be  
10 required; and that a meeting should be arranged to discuss any additional matters after Mr. Dains  
11 reviewed Rule 406. (Ex. D-10.)

12       58. On March 19, 1996, Mr. Wilkinson sent Mr. Dains a letter enclosing signed Water  
13 Service Agreements applicable to Terra Ranchettes and urging Mr. Dains to review the regulation  
14 sent in the January 1996 letter. (Ex. R-1 at RWC-2.) The Water Service Agreements, dated March  
15 18, 1996, stated that Rigby agreed to provide water service to each and every lot in accordance with  
16 the design shown on the attached subdivision plats; that Rigby agreed to inspect the project during  
17 construction to assure compliance with ADEQ-approved plans and specifications; and that upon  
18 completion, Rigby would be responsible for maintaining and operating the system. (*Id.*)

19       59. On May 2, 1996, the MCESD issued a Memo to the Arizona State Real Estate  
20 Department advising that the ATC for the water distribution system to serve Terra Ranchettes lots 1  
21 through 83 had been reinstated and was still valid. (LFE D-13.) The Memo showed that water was  
22 to be supplied by Rigby. (*Id.*)

23       60. After the plans for the water system were initially reviewed by Rigby, construction of  
24 the water system commenced. (Ex. R-1 at 4.) It is unclear precisely when construction began. Mr.  
25 Wilkinson testified that Rigby did not get notice from Dains that construction had begun. (Tr. at 71-  
26 72.)

27       61. On April 4, 1997, Mr. Wilkinson sent Mr. Dains a letter stating that First National  
28 needed the following items "to resolve all of the outstanding issues regarding the water system

1 constructed to service [Terra Ranchettes]”: (1) As-Builts of the water system, (2) copies of all  
2 microbiological test results for the water system and reservoir, and (3) copies of all pertinent invoices  
3 for construction of the water system. (Ex. D-4.) The letter also stated that, prior to installation, First  
4 National needed copies of plans for the installation of the proposed booster pumps, and that prior to  
5 acceptance of the system, First National would want to have a walk through of the system with TR  
6 partnership’s contractor using the As-Builts. (*Id.*)

7         62. On April 17, 1997, Mr. Wilkinson sent Mr. Dains a letter stating that First National  
8 had met with its engineer regarding modifications to Rigby’s pressure system and that Mr. Dains  
9 would be required to install the piping system in accordance with a plan signed by Tom Chisholm of  
10 MCESD on March 5, 1996. (Ex. D-5.) Mr. Wilkinson further stated that the following needed to be  
11 completed before any portion of the new construction was incorporated into Rigby’s water system:  
12 (1) pump design and pump curves; (2) electrical plans drawn and sealed by an electrical engineer  
13 noting the pump operation sequence; (3) As-Builts of the water system constructed; (4) engineer’s  
14 Certificate of Completion signed by Mr. Samers [sic]; (5) all blowoffs brought to grade as per  
15 Maricopa Association of Governments (“MAG”) specifications and details; (6) water system pressure  
16 tested to 100 psi for no less than 2 hours, as witnessed by a First National representative; and (7)  
17 water system and 50,000-gallon reservoir disinfected in accordance with Engineering Bulletin No. 8,  
18 as witnessed by a First National representative. (*Id.*)

19         63. On April 28, 1997, Mr. Wilkinson sent Mr. Dains another letter that mentioned a  
20 meeting of the same date and included a list of eight tasks to be completed, including installation of  
21 several items, replacement of a breaker panel, change out of a transformer, and the pressure testing  
22 and disinfection previously mentioned. (Ex. D-6; Tr. at 111.)

23         64. On June 12, 1997, Mr. Wilkinson sent Mr. Dains a letter stating that a final inspection  
24 of the water system had been made on June 11, 1997, by Terry Moore of Moore and Associates, Inc.;  
25 Rigby’s Field Operations Manager; and EPC Electric Power Control Corporation for the TR  
26 partnership. (Ex. D-7.) The letter provided a list of facility-related corrections that needed to be  
27 completed before Rigby would assume the system for operation and maintenance purposes and  
28 requested that Mr. Dains contact Rigby’s office for an additional inspection once the corrections had

1 been completed. (*Id.*)

2 65. Sometime before June 13, 1997, Jan Long, Construction Manager, Hilton Financial  
3 Corporation ("Hilton"), sent Mr. Wilkinson a letter providing "a breakdown of funds paid towards  
4 the construction of the Water System." (Ex. R-1 at RWC-14; Tr. at 155.) The letter provided a total  
5 of \$204,414.34.<sup>13</sup> (Ex. R-1 at RWC-14.)

6 66. In response to the letter from Hilton, on June 13, 1997, Mr. Wilkinson sent Ms. Long  
7 a letter stating, in part:

8 According to the rules and regulations of the Arizona Corporation  
9 Commission, Rigby is required to enter into a refund agreement with Mr.  
Daines [sic]. The agreement is established so the utility (Rigby) can  
purchase the system for continuous operation and maintenance purposes.

10 In order to establish the purchase price of the system, Rugby [sic] will  
11 need copies of all paid invoices applicable to the construction of the water  
12 system. Rigby is in receipt of your undated letter setting forth the cost of  
construction. At this time, Rigby is requesting detailed support for the  
costs.

13 Please provide copies of all paid invoices at your earliest opportunity.<sup>14</sup>

14 67. Mr. Wilkinson did not make any further efforts to obtain additional cost-related  
15 information from Hilton. (Tr. at 155.)

16 68. Construction of the water distribution system to serve Terra Ranchettes was completed  
17 before July 31, 1997.<sup>15</sup> (Ex. D-1 at 3; Tr. at 48.)

18 69. The first lot sold in Terra Ranchettes was sold to CD Dains's sister on July 31, 1997,  
19 for the Dains family's home. (Ex. D-1 at 4.) The TR partnership sold 7 lots in 1997, 21 lots in 1998,  
20 8 lots in 1999, and the last of the 83 lots in 2002. (*Id.*) CD Dains testified that Rigby provided water  
21 almost immediately after each lot was sold because the TR partnership would request a meter to be  
22 set at the time the property closed, and the manufactured homes were generally on site and hooked up  
23 to water and sewer within a few weeks of closing. (*Id.*) CD Dains testified that Rigby installed and  
24

25 <sup>13</sup> CD Dains testified that this was not a complete estimate, in that it did not include booster pumps. (*See* Tr. at 86-89.)

26 <sup>14</sup> Ex. D-11; Tr. at 155. We note that Exhibit D-11 is different from LFE D-11.

27 <sup>15</sup> Mr. Wilkinson testified that the water system was not constructed in accordance with the plans reviewed by Rigby, in  
28 that only a 50,000-gallon storage tank was installed at one of Rigby's well sites rather than 100,000 gallons of storage on  
a lot within Terra Ranchettes. (Ex. R-1 at 4-5.) In addition, Mr. Wilkinson testified that Mr. Dains was supposed to  
refurbish Rigby's Well #4, but did not do so. (Ex. R-1 at 5.) Mr. Wilkinson asserts that Rigby refurbished Well #4 at its  
own expense and installed two 10,000-gallon storage tanks, in order to comply with Decision No. 57360 and with  
Maricopa County requirements. (*Id.*)

1 read the water meters and that the TR partnership had to pay for the meters. (Ex. D-1 at 5.)

2 70. On February 4, 1998, Mr. Wilkinson wrote a memo to Mr. Dains telling him that  
3 Rigby needed a breakdown of the costs of the water system into seven listed categories<sup>16</sup> as well as a  
4 set of reproducible As-Builts. (Ex. R-1 at RWC-12.)

5 71. On May 12 or 13, 1998, Mr. Dains faxed Mr. Wilkinson a list of costs, partially typed  
6 and partially handwritten, with a stated total of \$207,388.67.<sup>17</sup> (Ex. R-1 at RWC-13.) The document  
7 includes a handwritten note reading, in legible part, "Ted. These figures will not jibe with Hilton."  
8 (*See id.*) The list is not broken down into the seven requested categories. (*See id.*)

9 72. CD Dains testified that Rigby told the TR partnership that an MXA needed to be done  
10 sometime in 1998, which CD Dains said did not make sense because the infrastructure had already  
11 been built, turned over to Rigby, and used by Rigby to sell water to customers in Terra Ranchettes.  
12 (Ex. D-1 at 5.)

13 73. On June 26, 1998, Mr. Wilkinson sent Mr. Dains a letter setting forth the estimated  
14 annual refund applicable to the water system serving Terra Ranchettes, based on two assumptions:  
15 (1) that the subdivision would be fully owner occupied, and (2) that the average annual water  
16 consumption would be 719,050 gallons per lot. (Ex. D-1 at CDD-4.) The letter then stated:

17 In determining the average annual consumption, the current consumptions  
18 were annualized to reflect the total estimated consumption for the totally  
occupied subdivision.

19 Based on the above, the annual refund is estimated to be \$12,225.00. If  
20 the occupancy or consumption varies so will the annual refund. Assuming  
the estimated refund is reasonably accurate, the refund agreement should  
be for approximately 20 years.<sup>18</sup>

21 At the bottom of the letter, there is a handwritten notation stating, "Included is copy of contract to be  
22 signed this week." (*Id.*)

23 74. Mr. Wilkinson calculated the estimated consumption for the lots in Terra Ranchettes  
24 himself, setting out his calculations in a June 26, 1998, handwritten document ("usage estimate").

25  
26 <sup>16</sup> The seven categories were: (1) water mains by size, including valves, valve cans, and lids and fittings; (2) water  
services by size, including service lines and meter boxes; (3) fire hydrants, including the tee on the mainline, fire hydrant  
27 valve, valve box, and lid; (4) reservoir; (5) booster pumps and motors; (6) booster pump piping and valves; and (7)  
controls systems. (Ex. R-1 at RWC-12.)

28 <sup>17</sup> CD Dains testified that this was not a complete estimate in that it did not include the storage tank. (*See Tr.* at 86-87.)

<sup>18</sup> Ex. D-1 at CDD-4.

1 (Ex. R-1 at RWC-6; *see* Tr. at 158-59.) The usage estimate lists each lot then on the water system  
2 and shows for each lot the initial meter reading and date; the meter reading taken on June 1, 1998; the  
3 consumption (apparently calculated by multiplying the difference between the two readings by 100);  
4 and then an annualized consumption for each lot. (*See* Ex. R-1 at RWC-6.) The calculation to  
5 annualize consumption for each lot is not shown, but resulted in annual consumption ranging from  
6 173,600 gallons to 2,106,600 gallons per lot. (*See id.*) These results would signify monthly water  
7 usage averaging from a low of 14,467 gallons per month to a high of 175,550 gallons per month.  
8 (*See id.*) Mr. Wilkinson concluded that Terra Ranchettes' 17 lots would use 12,223,825 gallons  
9 annually, or an average of 719,050 gallons annually per lot. (*See id.*) This result would signify  
10 average monthly water usage of 59,921 gallons per lot. (*See id.*)

11 75. At the time Mr. Wilkinson calculated the usage estimate, the water meters in Terra  
12 Ranchettes were being read by Rigby, and Rigby was preparing the bills and receiving the payments  
13 for such water usage. (Tr. at 158.) Mr. Wilkinson acknowledged in his testimony that he had made  
14 an obvious mistake regarding the usage estimate by adding an extra zero, which increased the  
15 projected annual consumption tenfold. (Ex. R-1 at 8.) Mr. Wilkinson asserted, however, that Mr.  
16 Dains should have been aware of that error prior to executing the MXA because Mr. Dains had the  
17 figures the assumption was based on, his family had purchased the first lot in Terra Ranchettes and  
18 had been one of the first to receive water service from Rigby,<sup>19</sup> and Mr. Dains regularly hooked up  
19 newly sold lots to the water system without informing Rigby and thus would be aware of water usage  
20 levels. (*Id.*) Mr. Wilkinson also pointed out that the Samer and Associates Water Report used a total  
21 domestic demand of 420 gallons per day per lot. (*Id.*) Mr. Wilkinson testified that it would be  
22 "absurd" to think that Mr. Dains could have reasonably relied on the mistaken usage estimate. (*Id.*)

23 76. On July 21, 1998, Mr. Wilkinson sent Mr. Dains a letter enclosing for Mr. Dains's  
24 review a draft copy of the MXA, minus exhibits. (Ex. R-1 at RWC-3.) The letter stated that Mr.  
25 Wilkinson would prepare the exhibits and finalize the MXA for signature after Mr. Dains's review  
26 and comments. (*Id.*)

27  
28 <sup>19</sup> One of the lots included in the usage estimate, Lot 83, was occupied by Mr. Dains and his family and in the usage estimate showed a water usage start date of July 14, 1997. (*See* Ex. R-1 at RWC-6, RWC-7.)



1        77.    On February 19, 1999, Mr. Wilkinson sent Mr. Dains a letter stating that an original  
2 and two copies of the MXA were enclosed and requesting that Mr. Dains execute the documents and  
3 return them. (Ex. R-1 at RWC-4.) Mr. Wilkinson further stated:

4            We still have the same problem with the agreements and that is the no  
5 copies of the paid invoices. In order to really have the agreements  
6 approved by the Arizona Corporation Commission, we will need copies of  
7 the invoices. We have attached as Exhibit B, a summary of the actual  
costs. Please review the agreement and the Exhibits and let me know if  
you have any comments or questions.<sup>20</sup>

8        78.    Mr. Dains signed the MXA on March 2, 1999, at which time Rigby was already  
9 serving approximately 30 customers in Terra Ranchettes. (Ex. R-1 at RWC-5; Ex. D-1 at 5.) Mr.  
10 Wilkinson signed the MXA on May 5, 1999. (Ex. R-1 at RWC-5.)

11        79.    Mr. Wilkinson testified that he does not believe Mr. Dains really understood what the  
12 MXA did, that he may not have entirely understood the purpose of the MXA, and that he may not  
13 have understood some of the provisions of the MXA. (Tr. at 146-47.)

14    **The MXA and the Refunds Made Thereunder**

15        80.    The MXA, by its own terms, states that it was entered into on October 1, 1998,  
16 although it was executed by Mr. Dains on March 2, 1999, and by Mr. Wilkinson on May 5, 1999.  
17 (Ex. R-1 at RWC-5.) The MXA is written as though Terra Ranchettes had not yet been developed;  
18 makes the TR partnership responsible for causing the proposed water system to be designed,  
19 constructed, or installed as necessary to provide an adequate supply of water to every dwelling unit  
20 within Terra Ranchettes; and makes the TR partnership responsible for all costs associated with the  
21 construction of the water system. (*Id.*) Regarding documentation of construction costs and the  
22 refund of those costs, the MXA states the following:

23            3) Applicants [sic] cost, as set forth in Exhibit B, a copy of which is  
24 attached hereto and made a part hereof, shall be subject to refund in  
accordance with the rules and regulations of the ACC and further  
described in Section 16 of this Agreement.

25            . . . .

26            14) Applicant shall, within 120 days following acceptance by Utility of  
facilities, furnish Utility with the following described original documents.

27            a) Copies of all invoices and billings and other statements of

28    <sup>20</sup> Ex. R-1 at RWC-4.

expenses incurred by Applicant for the construction of the domestic water system.

b) Releases and waivers from contractors, sub-contractors and vendors for materials, equipment, supplies, labor and other costs of construction of said facilities.

....

16) The cost of construction and installation of facilities as evidenced by invoices furnished to Utility pursuant to Section 14 shall be advances in aid of construction subject to refund by Utility to Applicant. Utility shall make refunds annually to Applicant on or before August 31 for the preceding July 1 through June 30 period. The amount to be refunded annually shall be ten percent (10%) of the revenues (excluding sales taxes and all District, Municipal, County State or Federally imposed regulatory assessments) derived from the provision of metered domestic water service to the Property. Refunds shall be payable for a period of twenty (20) years from the date metered domestic water service is initiated to the Property. In no event shall the refunds paid to Applicant exceed the amount of the advanced [sic] in aid of construction. Any balance remaining a [sic] the end of the twenty year period shall become non-refundable. No interest shall be paid on any amount(s) advanced.<sup>21</sup>

81. Exhibit B to the MXA is dated February 18, 1999, and sets forth itemized costs within each of the following six categories, which are then summarized as follows:

Distribution System:	\$124,931.00
Services:	\$14,268.00
Reservoir:	\$29,600.00
Booster Pumps:	\$50,851.00
Easement:	\$16,000.00
Miscellaneous:	\$1,338.68
Total	\$236,988.68 <sup>22</sup>

82. Mr. Wilkinson testified that the MXA for Terra Ranchettes is the only MXA Rigby has ever entered into, (Tr. at 148, 169), although First National has had at least seven MXAs, (Tr. at 169). Mr. Wilkinson also testified that First National has never had an MXA with a term of 20 years and has never agreed to refund more than 10 percent of the annual revenue generated by a system. (Ex. R-1 at 9.)

83. Rigby first began providing refunds under the MXA in 2000. (Ex. R-1 at 9.) From 2000 through 2006, Rigby provided Mr. Dains the following refunds:<sup>23</sup>

...

...

<sup>21</sup> Ex. R-1 at RWC-5.

<sup>22</sup> *Id.*

<sup>23</sup> See Ex. R-1 at RWC-9.

Date Made	For Period	Refund Amount
September 22, 2000	January 1998 – July 2000	\$2,894.16
August 29, 2001	August 2000 – July 2001	\$1,924.00
August 23, 2002	July 2001 – June 2002	\$2,169.80
August 1, 2003	July 2002 – June 2003	\$2,292.54
July 7, 2004	July 2003 – June 2004	\$2,175.05
July 13, 2005	July 2004 – June 2005	\$2,388.01
July 14, 2006	July 2005 – June 2006	\$2,617.05

84. Mr. Dains did not raise any issue with Rigby about the amount of the refund checks until 2006. (Tr. at 66; Ex. R-1 at 9-12.)

85. On August 15, 2006, Mr. Dains<sup>24</sup> sent Mr. Wilkinson a letter acknowledging receipt of the refund for 2005 - 2006, stating that he had never received documentation of actual meter readings and usage so as to calculate refund payments, stating that the level of refunds would result in his recovering less than 20 percent of the actual construction costs for the plant, stating that the refund situation needed to be rectified immediately, referencing Avondale's appraisal of Rigby's system within Avondale, stating that he would have a vested interest in a sale pursuant to the MXA, and suggesting that Mr. Dains and Mr. Wilkinson meet to discuss renegotiation of the MXA "to better reflect the expectations as to system repayment." (Ex. R-2.) Mr. Dains suggested a lump sum "catch up payment" or an accelerated buy-out at a discounted rate. (*Id.*)

86. In October 2006, after learning about the possible condemnation of Rigby by Avondale, CD Dains filed with the Commission an informal complaint against Rigby regarding the MXA refunds. (Tr. at 66-67.) The informal complaint was closed in November 2007, without any action by the Commission.<sup>25</sup> (Tr. at 189.) CD Dains did not follow up with the Commission regarding the informal complaint until the Complaint was filed in 2009. (Tr. at 66-67.)

87. Since the informal complaint, Rigby has made the following additional refund payments to Dains:<sup>26</sup>

...

<sup>24</sup> Although this letter was signed by Mr. Dains, it appears that CD Dains was the author of the letter. (*See* Tr. at 66.) According to his testimony, CD Dains "started writing the letters" to Rigby about the refunds in 2006. (*Id.*)

<sup>25</sup> It is unclear from the record on what basis the informal complaint was closed. (*See* Tr. at 189.)

<sup>26</sup> *See* Ex. R-1 at RWC-10.

Date Made	For Period	Refund Amount
July 23, 2007	July 2006 – June 2007	\$2,770.45
July 16, 2008	July 2007 – June 2008	\$2,892.73
July 13, 2009	July 2008 – June 2009	\$2,716.59
July 14, 2010	July 2009 – June 2010	\$2,421.05

88. Mr. Wilkinson testified that Mr. Dains did not voice any concerns about the amount of the refunds received after the informal complaint until the Complaint was filed in 2009. (Ex. R-1 at 13.)

89. Mr. Wilkinson testified that Rigby has fully met its obligations under the terms of the MXA and that Dains has not because Dains never provided actual cost information, As-Builts, or the ATC required by the Commission for approval of an MXA. (Ex. R-1 at 13.) Mr. Wilkinson believed that Mr. Dains had not obtained an ATC, (Ex. R-1 at 4), although Mr. Wilkinson never contacted Maricopa County to inquire about the ATC, (Tr. at 115-16). Mr. Wilkinson asserted that without the ATC and other information requested from Mr. Dains, Rigby was unable to seek Commission approval of the MXA. (Ex. R-1 at 14.)

90. Staff was unable to find any record of Rigby's having filed the MXA with the Commission before this matter commenced. (Ex. S-1 at 2; Tr. at 188-89.)

91. Rigby did not file the MXA with the Commission for approval until May 18, 2009, after the Complaint was filed. (Ex. R-1 at 14; Tr. at 166.)

92. Mr. Wilkinson testified that Rigby attempted to get an MXA finalized before construction of the Terra Ranchettes water system began, but that Mr. Dains was uncooperative and incredibly disorganized. (Ex. R-1 at 6.) Mr. Wilkinson stated that in addition to sending Mr. Dains letters about the missing information, he also spoke to Mr. Dains about the missing documentation on several occasions, to no avail. (Ex. R-1 at 13-14.) Mr. Wilkinson also acknowledged, however, that he did not condition acceptance of the water system on receipt of the outstanding documents, although he could have. (Tr. at 115-16.) Mr. Wilkinson testified that Mr. Dains repeatedly told Mr. Wilkinson that the MXA would be taken care of, but never took care of it; that Mr. Wilkinson had to hound Mr. Dains for almost four years to get the MXA signed; and that Mr. Wilkinson was never able to get Mr. Dains to meet his obligations under the MXA. (Ex. R-1 at 6.)

93. CD Dains testified that Hilton had all of the paid invoices and that he believes Hilton provided them directly to Rigby. (Tr. at 45-46, 49.) Because Hilton served as the construction financing source for construction of Terra Ranchettes, Hilton handled all of the bills and payments pursuant to those bills. (Tr. at 49-50.)

94. Mr. Wilkinson testified that he only requested the paid invoices from Hilton one time and then dropped it after hearing nothing back. (Tr. at 155.) Mr. Wilkinson further testified that he never contacted the Commission about having any problem getting documents from Mr. Dains, because it never occurred to him. (Tr. at 167.)

#### Commission Requirements Related to MXAs

95. Rule 406 provides, in pertinent part:

- A. Each utility entering into a main extension agreement shall comply with the provisions of this rule which specifically defines the conditions governing main extensions.
- B. An applicant for the extension of mains may be required to pay to the Company, as a refundable advance in aid of construction, before construction is commenced, the estimated reasonable cost of all mains, including all valves and fittings.
  - 1. In the event that additional facilities are required to provide pressure, storage or water supply, exclusively for the new service or services requested, and the cost of the additional facilities is disproportionate to anticipated revenues to be derived from future consumers using these facilities, the estimated reasonable cost of such additional facilities may be included in refundable advances in aid of construction to be paid to the Company.
  - .....
  - 3. Where the utility requires an applicant to advance funds for a main extension, the utility shall furnish the applicant with a copy of the Commission rules on main extension agreements prior to the applicant's acceptance of the utility's extension agreement.
  - .....
- C. Minimum written agreement requirements
  - 1. Each main extension agreement shall include the following information:
    - a. Name and address of the applicant(s)
    - b. Proposed service address
    - c. Description of requested service
    - d. Description and map of the requested line extension
    - e. Itemized cost estimate to include materials, labor, and other costs as necessary
    - f. Payment terms

- g. A clear and concise explanation of any refunding provisions, if applicable
- h. Utility's estimated start date and completion date for construction of the main extension

....

**D.** Refunds of advances made pursuant to this rule shall be made in accord with the following method: the Company shall each year pay to the party making an advance under a main extension agreement, or that party's assignees or other successors in interest where the Company has received notice and evidence of such assignment or succession, a minimum amount equal to 10% of the total gross annual revenue from water sales to each bona fide consumer whose service line is connected to main lines covered by the main extension agreement, for a period of not less than 10 years. Refunds shall be made by the Company on or before the 31<sup>st</sup> of August of each year, covering any refunds owing from water revenues received during the preceding July 1<sup>st</sup> to June 30<sup>th</sup> period. A balance remaining at the end of the ten-year period set out shall become non-refundable, in which case the balance not refunded shall be entered as a contribution in aid of construction in the accounts of the Company, however, agreements under this general order may provide that any balance of the amount advanced thereunder remaining at the end of the 10 year period set out, shall thereafter remain payable in whole or in part and in such manner as is set forth in the agreement. The aggregate refunds under this rule shall in no event exceed the total of the refundable advances in aid of construction. No interest shall be paid by the utility on any amounts advanced. The Company shall make no refunds from any revenue received from any lines, other than customer service lines, leading up to or taking off from the particular main extension covered by the agreement.

....

**F.** The Commission will not approve the transfer of any Certificate of Public Convenience and Necessity where the transferor has entered into a main extension agreement, unless it is demonstrated to the Commission that the transferor has agreed to satisfy the refund agreement, or that the transferee has assumed and has agreed to pay the transferor's obligations under such agreement.

....

**H.** The size, design, type and quality of materials of the system, installed under this rule location in the ground and the manner of installation, shall be specified by the Company, and shall be in accord with the requirements of the Commission or other public agencies having authority therein. . . .

**I.** All pipelines, valves, fittings, wells, tanks or other facilities installed under this rule shall be the sole property of the Company, and parties making advances in aid of construction under this rule shall have no right, title or interest in any such facilities.

....

**M.** All agreements under this rule shall be filed with and approved by the Utilities Division of the Commission. No agreement shall be approved unless accompanied by a Certificate of Approval to Construct as issued by the Arizona Department of Health Services.

Where agreements for main extensions are not filed and approved by the Utilities Division, the refundable advance shall be immediately due and payable to the person making the advance.<sup>27</sup>

96. Upon receipt of an MXA, a Staff analyst uses a checklist to verify that the MXA contains the information required by Rule 406. (Tr. at 187.) If the Staff analyst determines that something from the checklist is missing, the Staff analyst telephones the utility to inquire about the missing item. (Tr. at 190-91.) Then, if the Staff analyst does not get the missing item within about 30 days, the Staff analyst sends a letter setting forth what is missing. (Tr. at 191.) After the Staff analyst determines that all the checklist items are met, the MXA is provided to a Staff engineer for review to determine system capability to handle the new extension and the reasonableness of the costs included in the MXA. (Tr. at 187.) If Staff determines that the MXA meets the requirements of Rule 406, Staff sends an approval letter to the utility and retains a copy of the MXA in Staff's files for 10 years. (Ex. S-1 at 2.)

### **The Parties' Positions**

#### **Dains**

97. Dains argues that based on the MXA, Rule 406(M), and equity, Rigby should immediately refund to the TR partnership \$209,727.25,<sup>28</sup> which represents the construction costs of the water system plant as included in the MXA minus the \$27,261.43 refunded by Rigby thus far. Dains also asserts that Rigby should be required to pay Dains \$154,855.84 in interest (calculated at a rate of 1.5% for the period from 2000 to 2011) because Rigby violated Rule 406(M) in 1999 by failing to file the MXA when it was executed. Dains asserts that Rigby's compliance problems damaged the TR partnership, that Rigby forced Dains to build an oversized storage tank, that Rigby agreed in return to refund all of the construction costs over 20 years, and that Rigby has failed to honor that agreement and intends only to refund a small fraction of the construction costs. Dains further asserts that Rigby had all of the information that it needed to file the MXA with the Commission, including construction costs as shown on Exhibit B of the MXA and the ATC obtained by Dains. Because Rigby failed to file the MXA, Dains argues, Rigby must refund the remainder of

<sup>27</sup> A.A.C. R14-2-406.

<sup>28</sup> Dains used a figure of \$209,737.25, based on a slight error in the water system plant construction costs.

1 the advanced funds to Dains, as required by Rule 406(M). Dains further argues that Rigby will be  
2 unjustly enriched if it is permitted to be "condemned and purchased" by Avondale at a price of  
3 \$2,560,000, which Dains says far exceeds the value of Rigby's remaining plant in service. Dains also  
4 warns that the Commission will lose jurisdiction over Rigby once a decision is issued in the  
5 Cancellation Docket, because Rigby will cease to be a public service corporation.

6 Rigby

7 98. Rigby argues that the Commission either should find that Rigby has complied with  
8 Rule 406(M), because there is no deadline therein for the filing of an MXA, and it has now been filed  
9 for approval, or that any technical noncompliance should be excused as a matter of law because  
10 Dains actively precluded Rigby from filing the MXA for Commission approval. Rigby asserts that  
11 Mr. Dains failed to respond to Rigby's requests to enter into an MXA, although Rigby had provided  
12 Mr. Dains with Rule 406; unilaterally developed Terra Ranchettes rather than providing funds to  
13 Rigby to do so;<sup>29</sup> and failed to substantiate the costs of construction and to provide the ATC for the  
14 water system to Rigby, thereby preventing Rigby from filing the MXA with the Commission. Rigby  
15 also asserts that Mr. Dains knew that he was not selling the water system to Rigby and was fully  
16 aware that he would likely not recover the costs of construction through the MXA. Rigby  
17 characterizes Mr. Dains's decision to file the informal complaint only after becoming aware of  
18 Avondale's desire to acquire Rigby's system as a "bad faith" attempt to profit from his misdeeds.  
19 Rigby argues that both Arizona contract law and principles of equity support a decision in Rigby's  
20 favor and that Rule 406(F) does not apply in the context of condemnation because the CC&N is not  
21 being transferred.

22 Staff

23 99. Staff asserts that Rigby was "between a rock and a hard place" because it had a signed  
24 MXA but could not get Staff approval of it under Rule 406(M) because Rigby did not have the ATC,  
25 but that Rigby should have approached Staff for assistance in resolving the issue and should not be  
26 relieved of its obligation to submit the MXA for approval. Staff points out that the Commission has

27 <sup>29</sup> This assertion seems disingenuous in light of Mr. Wilkinson's January 1996 letter to Mr. Dains stating that Rule 406  
28 required completion of an MXA and that an MXA requires an applicant (Dains) to cause the water system to be  
constructed and the utility to refund the cost to the applicant under certain terms and conditions. (See Ex. D-10.)



1 previously enforced Rule 406(M) to require immediate refund of an advance, less any refunds paid,  
 2 when an MXA was not filed with or approved by Staff,<sup>30</sup> and asserts that Rigby should refund the  
 3 advance less any refunds already made to Dains. Staff cautions against the narrow reading of Rule  
 4 406(F) urged by Rigby, stating that while the Commission does not have jurisdiction over a  
 5 municipality, it would retain jurisdiction over a public service corporation and could impose the  
 6 requirements of Rule 406(F) on a utility to ensure that the rights of a party to an MXA are protected.  
 7 Staff further asserts that Rule 406(M) should not be read in a way that allows a utility to be “dilatory”  
 8 in timely submitting an MXA for approval. Staff acknowledges that Rule 406(M) does not have an  
 9 express time limitation, but asserts that under the equitable principle of laches, a utility should not  
 10 delay in the submission of an MXA, because an unreasonable delay could result in prejudice and  
 11 harm to the parties to the MXA.

## 12 **Discussion and Resolution**

13       100. In the MXA, Mr. Dains made what could perhaps be characterized as a  
 14 disadvantageous deal, likely in reliance on the erroneous usage estimate and the resulting wildly  
 15 overstated refund estimate provided by Mr. Wilkinson. Mr. Dains may have believed that the  
 16 transaction was a sale of the water system because the MXA was drafted after the actual construction  
 17 of the water system, no attorneys appear to have provided advice either to Mr. Dains or to Rigby  
 18 regarding the MXA, Mr. Dains had no prior experience with private water utilities, Mr. Wilkinson  
 19 himself even referred to the transaction as a “purchase” of the water system in his letter to Hilton, the  
 20 refund estimate provided by Mr. Wilkinson and the 20-year refund period included in the MXA  
 21 would have resulted in reimbursement of all of the TR partnership’s construction costs, and the 20-  
 22 year refund period appears to have been designed to result in full or close to full reimbursement.<sup>31</sup>  
 23 Mr. Wilkinson himself testified that Mr. Dains may not have understood what the MXA really meant,  
 24 and Mr. Dains and Mr. Wilkinson clearly were mismatched in knowledge of the operations of private  
 25 water utilities, in the purpose for and terms of an MXA, and in what a reasonable water usage

26 <sup>30</sup> Staff referenced Decision No. 66593 (December 9, 2003).

27 <sup>31</sup> See Ex. D-1 at CDD4 (in which Mr. Wilkinson stated, “[a]ssuming the estimated refund is reasonably accurate, the  
 28 refund agreement should be for approximately 20 years”). The refund period would be approximate and would be  
 premised on the estimated annual refund figure only if the refund period was designed to result in full or close to full  
 repayment of the amount advanced.

1 estimate would be. Dains is not challenging the validity of the MXA, however, but instead is asking  
2 that a regulatory requirement related to MXAs (Rule 406(M)) be enforced.

3 101. Rigby was aware of the requirements of Rule 406, including the requirements of Rule  
4 406(M), before the water system for Terra Ranchettes was constructed. This is evident because Mr.  
5 Wilkinson brought Rule 406 to Mr. Dains's attention before the water system was constructed. Had  
6 Rigby chosen to build the water system itself using an advance of funds from the TR partnership, as  
7 contemplated by Rule 406, this dispute might have been avoided. However, Rigby instead chose to  
8 have the water system built by the TR partnership, subject to refund, and failed to ensure that the  
9 MXA was executed before construction was commenced, before it was completed, or even before  
10 Rigby began providing water service to customers on the Terra Ranchettes system. Rule 406 clearly  
11 contemplates that an MXA will be completed prior to construction of a water system. (See Rule  
12 406(C)(l)(h).)

13 102. Rigby is a public service corporation providing water service pursuant to an Arizona  
14 CC&N and, as such, was obligated under Rule 406(M) to file the MXA with Staff for approval and to  
15 have the MXA approved. Although Rule 406(M) does not specify a deadline by which this filing  
16 must take place, in the face of such silence, the law implies a reasonable time for performance.<sup>32</sup>  
17 While there is room for argument about what a reasonable time for filing the MXA might be, we find  
18 that approximately 10 years after execution is not a reasonable time for filing the MXA. Allowing a  
19 utility to wait 10 years, or until after performance under the MXA has been completed, to file an  
20 MXA for approval would thwart the Commission's purpose in having Staff review and approve  
21 MXAs, especially because MXAs generally require refunds to be made for only 10 years.

22 103. We are not persuaded by Rigby's argument that it could not file the MXA with Staff  
23 for approval because of Mr. Dains's alleged failure to provide Rigby with invoices for the costs of  
24 construction and his alleged failure to provide Rigby with a copy of the ATC. Rule 406(C) requires  
25 only "an itemized cost estimate," not invoices. Furthermore, Rigby included \$236,988.68 in  
26 construction costs in Exhibit B of the MXA as the amount of "Applicants cost [sic] . . . subject to  
27

28 <sup>32</sup> See, e.g., *Haralson v. Rhea*, 76 Ariz. 74 (Ariz. 1953); *Hartley v. Vitiello*, 154 A. 255 (Conn. 1931).

refund.” (Ex. R-1 at RWC-5.) Based on Rigby’s knowledge of the rule and its inclusion of the \$236,988.68 in the MXA as the construction costs for the system, we conclude that Rigby believed that it had received sufficient verification of those costs. As for not having a copy of the ATC, the ATC is a public document that Rigby could have obtained from Maricopa County had it attempted to do so, which it admittedly did not.<sup>33</sup>

104. Although neither Rigby nor Dains is without fault in this dispute, it is Rigby, as the public service corporation obligated under Rule 406(M), who must be held responsible for its failure to file the MXA with Staff for approval and to obtain approval of the MXA. This is what Rule 406(M) requires, and we are not persuaded by Rigby’s arguments that the rule should not be followed in this case. Thus, we will require Rigby immediately to refund to Dains the amount of \$209,727.25, without interest,<sup>34</sup> as required under Rule 406(M). Because it is unnecessary for the resolution of this dispute to reach the other arguments offered by the parties, we decline to do so.

### CONCLUSIONS OF LAW

1. Rigby is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. §§ 40-246, 40-281, and 40-282.

2. The Commission has jurisdiction over Rigby and the subject matter of the Complaint.

3. A.R.S. § 40-246(A) allows any person to make a written complaint to the Commission setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or order or rule of the Commission.

4. Service of the Complaint was made upon Rigby, and notice of the hearing scheduled herein was provided to Rigby, as required by A.R.S. § 40-246.

5. Rigby and Dains entered into an MXA in approximately March 2009.

<sup>33</sup> We note with some concern that Mr. Wilkinson appears to have believed that there was no ATC, as this calls into question why Rigby would have accepted the Terra Ranchettes water system into its existing system. Current ADEQ rules prohibit a person from extending an existing public water system before receiving an ATC from ADEQ. (A.A.C. R18-5-505(B).) The issue of Rigby’s potential noncompliance with then-existing ADEQ requirements as to ATCs and Approvals of Construction was not litigated in this matter, however, and need not be addressed to resolve the Complaint herein.

<sup>34</sup> A.A.C. R14-2-406(M) does not require payment of interest, and we are not persuaded by Dains’s arguments that it should nevertheless be paid interest. Dains chose to wait a number of years before filing its informal complaint and then its Complaint, and its delay in bringing the matter to the Commission’s attention should not be rewarded by requiring Rigby to pay interest on the amount to be refunded.

6. A.A.C. R14-2-406(M) requires that all MXAs entered into by water utilities be filed with and approved by Staff within a reasonable time.

7. As a public service corporation providing water service under an Arizona CC&N, Rigby was obligated to comply with A.A.C. R14-2-406(M) by filing the MXA with Staff for approval within a reasonable time.

8. Rigby did not comply with A.A.C. R14-2-406(M) by filing the MXA with Staff for approval within a reasonable time.

9. A.A.C. R14-2-406(M) provides that where an MXA is not filed with and approved by Staff, the refundable advance becomes immediately due and payable to the person making the advance.

10. Rigby's failure to comply with A.A.C. R14-2-406(M)'s requirement for an MXA to be filed with and approved by Staff results in the refundable advance under the MXA, minus the amount of refunds made thus far under the MXA, becoming immediately due and payable to Dains.

11. Under A.A.C. R14-2-406(M), Rigby must immediately pay Dains \$209,727.25.

## ORDER

IT IS THEREFORE ORDERED that Rigby Water Company shall, as soon as possible and no later than 30 days after the effective date of this Decision, pay to the Estate of Charles J. Dains the amount of \$209,727.25.

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IT IS FURTHER ORDERED that Rigby Water Company shall, within 10 days of making payment to the Estate of Charles J. Dains as ordered herein, file with the Commission's Docket Control, in this docket, proof of having made such payment in the form of copies of the payment instrument and copies of proof of delivery of the payment instrument to, or acknowledgment of receipt of the payment instrument by, an agent of the Estate of Charles J. Dains.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, ERNEST G. JOHNSON, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

ERNEST G. JOHNSON  
EXECUTIVE DIRECTOR

DISSENT

DISSENT

1 SERVICE LIST FOR: CHARLES J. DAINS V. RIGBY WATER COMPANY

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